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266 NLRB No. 169

D--9896
Salt Lake City, UT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

P-W PAINTERS, INC.

and

Case 27--CA--8130

LOCAL UNION 77, BROTHERHOOD OF PAINTERS AND ALLIED TRADES

DECISION AND ORDER

Upon a charge filed on 1 November 1982 by Local Union 77, Brotherhood of Painters and Allied Trades, herein called the Union, and duly served on P-W Painters, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on 2 December 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent has failed to file an answer to the complaint.

On 13 January 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment based on

Respondent's failure to file an answer as required by Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended. Subsequently, on 21 January 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent failed to file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent herein specifically states that unless an answer to the complaint is filed within 10 days of service ''all of the allegations in the Complaint shall be deemed to be admitted to be true and may

be so found by the Board.'' Further, according to the uncontroverted allegation in the Motion for Summary Judgment, Respondent's attorney, in a telephone conversation on 29 December 1982, informed the Regional Attorney for Region 27 that no answer would be filed, in light of Respondent's seeking dissolution of the Company. As noted above, no answer to the complaint has been received to date from Respondent.

Therefore, as Respondent has not filed an answer acceptable under the Board's Rules and Regulations within 10 days from the service of the complaint, and as no good cause for its failure to do so has been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted to be true and are so found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is now, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of Utah, and maintains its principal office and place of business at Salt Lake City, Utah, where it has engaged in the business of contracting for painting and wallcovering.

The Salt Lake City chapter of the Painting and Decorating Contractors of America (herein PDCA) is a multiemployer organization whose function, in part, is to bargain collectively

on behalf of its members. The Employers who comprise the PDCA in the course and conduct of their business operations annually purchase and receive goods and materials valued in excess of $50,000 directly from points and places outside the State of Utah, and annually provide services in excess of $500,000 to firms, which in turn purchase and receive goods and materials valued in excess of $50,000 annually directly from outside the State of Utah.

At all times material herein, Respondent has been a member of the PDCA and we find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local Union 77, Brotherhood of Painters and Allied Trades, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

On or about 23 October 1980, PDCA, on behalf of its employer- members, and the Union entered into a collective-bargaining agreement covering wages, hours, and working conditions for journeyman and apprentice painters. The agreement had a term through 31 July 1984.

At all times since 23 October 1980 the Union has been the representative for collective-bargaining purposes and the exclusive representative under Section 9(a) of the Act for the

following employees who constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by PDCA subject to its collective-bargaining agreement with the Union effective November 23, 1980 through July 31, 1984, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

Since on or about 5 May 1981 Respondent has been a member of the PDCA and has operated subject to the terms and conditions of the collective-bargaining agreement between PDCA and the Union. At all times material, a majority of the employees of Respondent in the unit described above have designated or selected the Union as their representative for the purpose of collective bargaining with Respondent.

Since on or about 1 July 1982 and continuing to date the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of all the employees of Respondent in the above-described unit.

Commencing on or about 1 July 1982, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of all the employees in the unit described above, in that:

1. Since on or about 1 July 1982 Respondent has failed and refused to meet and bargain with the Union concerning wages, hours, and other terms and conditions of employment.

2. Since on or about 1 July 1982 Respondent has failed and refused to pay its employees in the unit described above according to the terms of its collective-bargaining contract with the Union.

3. Since on or about 1 July 1982 Respondent has sought to terminate unilaterally its obligations under the contract referred to above.

Accordingly, we find that by such actions Respondent, since on or about 1 July 1982, and at all times thereafter, has refused to bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit, and we conclude that, by such conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent, since on or about 1 July 1982 and at all times thereafter, has refused to meet and bargain with the Union concerning wages, hours, and other terms and conditions of employment. We shall order that Respondent, upon request, meet and bargain collectively and in good faith with the Union as the exclusive representative of all employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

We have found that Respondent, since or about 1 July 1982 and at all times thereafter, has failed and refused to pay its employees according to the terms of its collective-bargaining contract with the Union. We shall order that Respondent pay its employees according to the terms of its collective-bargaining contract with the Union. We shall also order that Respondent make the employees whole for any loss of wages or benefits they may have suffered as a result of Respondent's failure to pay its employees according to the terms of its contract with the Union, with interest thereon to be computed in the manner prescribed in Florida Steel Corporation, 231 NLRB 651 (1977).[1]

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[1] See Ogle Protection Service, Inc. and James L. Ogle, 183 NLRB 682, 683 (1970); and see, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Provided there has been a loss of benefit funds due the employees in accordance with the collective-bargaining agreement between Respondent and the Union, the Board will not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and where there are no governing provisions, to evidence of any loss (continued)

We have found that Respondent, since on or about 1 July 1982 and at all times thereafter, has sought to terminate unilaterally its obligations under the contract referred to above. We shall order that Respondent cease and desist therefrom.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. P-W Painters, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union 77, Brotherhood of Painters and Allied Trades, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by PDCA subject to its collective-bargaining agreement with the Union effective 23 November 1980 through 31 July 1984, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about 5 May 1981 P-W Painters, Inc., has been a member of PDCA subject to the terms and conditions of the collective-bargaining agreement referred to above.

5. At all times material herein, the Union has been the exclusive representative of all the employees in the aforesaid

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[1] directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See Merryweather Optical Company, 240 NLRB 1213, 1216, fn. 7 (1979).

appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing since on or about 1 July 1982 and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By failing and refusing since on or about 1 July 1982 to pay its employees in the unit described above according to the terms of its collective-bargaining contract with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. By attempting since on or about 1 July 1982 and at all times thereafter to terminate unilaterally its obligations under the collective-bargaining contract referred to above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. By the aforesaid refusal to bargain collectively and in good faith, the refusal to pay its employees according to the terms of its collective-bargaining contract with the Union, and the attempt to terminate unilaterally its obligations under its collective-bargaining contract with the Union, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has

engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, P-W Painters, Inc., Salt Lake City, Utah, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Union 77, Brotherhood of Painters and Allied Trades, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by PDCA subject to its collective-bargaining agreement with the Union effective November 23, 1980 through July 31, 1984, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

(b) Failing and refusing to pay its employees in the unit described above according to the terms of its collective-bargaining contract with the Union.

(c) Attempting to terminate unilaterally its obligations under the collective-bargaining contract with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Make whole its employees for their loss of wages and other employment benefits they may have suffered by reason of Respondent's failure and refusal to pay its employees in the unit described above according to the terms of its collective-bargaining contract with the Union, plus interest, in the manner set forth in the section of this Decision entitled ''The Remedy.''

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Salt Lake City, Utah, place of business copies of the attached notice marked ''Appendix.''[2] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 3 June 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Union 77, Brotherhood of Painters and Allied Trades, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT fail and refuse to pay our employees in the unit described below, according to the terms of our collective-bargaining contract with the Union.

WE WILL NOT attempt to terminate unilaterally our obligations under our collective-bargaining contract with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment. The bargaining unit is:

All employees employed by PDCA subject to its collective-bargaining agreement with the Union effective 23 November 1980 through 31 July 1984, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL make whole our employees with interest for their loss of wages and other employment benefits they may have suffered by reason of our failure to abide by our agreement with the Union since on or about 1 July 1982.

P-W PAINTERS, INC.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303--837--3553.